In the Supreme Court of the United States

OCTOBER TERM, 1951

No. —

HARRY GORDON, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, PETITIONER

v.

KNUT EINAR HEIKKINEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit reversing the order of a three-judge United States District Court for the District of Minnesota denying respondent's petition for a writ of habeas corpus, and remanding the cause to the District Court with directions that respondent be granted bail in the deportation proceeding pending against him.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 84–91) is reported at 190 F. 2d 16. The findings of

fact and conclusions of law of the three-judge District Court appear at pages 15–19 of the record and those of the one-judge District Court at pages 11–14.

JURISDICTION

The judgment of the Court of Appeals was entered June 20, 1951 (R. 91). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Attorney General abused his discretion to grant or withhold bail pending final determination of the deportability of an alien, by denying bail on the basis of the alien's participation in Communist Party affairs.

STATUTE INVOLVED

Section 20 (a) of the Immigration Act of February 5, 1917 (39 Stat. 874, 890, 54 Stat. 1238, 57 Stat. 553; 8 U. S. C. 156) as amended by Section 23 of the Internal Security Act of 1950 (Pub. L. 831, c. 1024, 81st Cong., 2d sess.), provides in pertinent part as follows:

> * * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3)

be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made. * * *

STATEMENT

On November 21, 1949, respondent was taken into custody under a deportation warrant of arrest, issued on November 10, 1949 (R. 1, 23–24), charging that he was subject to deportation (a) under the Immigration Act of May 26, 1924 (43 Stat. 153) in that at the time of entry he was not in possession of a valid immigration visa and (b) under Section 1 of the Act of October 16, 1918, as amended (8 U. S. C. 137) [1] in that he was at the time of entry, and after entry, a member of an organization advocating the violent overthrow of the government. Eight days later he was released on $5,000 bail. (R. 1, 5, 38, 39.)

On October 23, 1950, shortly after the effective date of the Internal Security Act, respondent was rearrested and detained without bail, pursuant to instructions from the Central Office of the Im-

[1] Section 1 of the 1918 Act has since been further amended by Section 22 of the Internal Security Act of 1950.

migration and Naturalization Service to the Service's New York Office which were relayed by telephone to petitioner (R. 25–29, 33–34, 65–66).

Four days later, respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of Minnesota, challenging the validity of his detention (R. 1–4). Judge Donovan denied the petition (R. 11–14). Respondent's request for a rehearing before a three-judge District Court was subsequently granted (R. 9, 15). At a hearing on the writ before the three-judge court, respondent took the stand in support of his petition. He testified that he was born in Finland in 1890; that he left there and went to Canada in 1910, where he was naturalized; that he came to this country from Canada in 1916; that he lost his Canadian citizenship by remaining away and is stateless (R. 41–43); that he married an American citizen and has three children, all born in this country, but that he has not lived with them for 15 years (R. 37, 56); that he was a member of the Communist Party from 1923 to 1930 (R. 50); that in 1932 he went to Russia without a passport, remained there for three years, then illegally reentered the United States; that while in Russia he held responsible positions with the Soviet government; that he went to Russia to seek reconciliation with his wife who had gone there (R. 44–47, 54, 55); that since his return to this country, for 15 years, he has served as editor of the Finnish newspaper,

"Eteepain", which was located in the same building as the National Headquarters of the Communist Party (R. 47–48, 53); that for the past two years he has been a member of the Executive Committee of the International Workers Order which was on the Attorney General's list of subversive organizations (R. 52, 62); that subsequent to the time he was a member of the Communist Party he has attended Communist Party functions without being a member (R. 50); that he would oppose an invasion by the United States of Russia but would support such an invasion of Spain (R. 61–62); that he has never been convicted of any crime (R. 38) and that he had carried out the terms and conditions of his previous bail (R. 39).

In denying the petition, the three-judge District Court found, *inter alia,* that the Internal Security Act is constitutional; that the rearrest was made under a valid warrant; and that the Attorney General did not abuse the discretion granted him by the Internal Security Act in canceling bail and placing respondent under restraint (R. 17). In reaching its conclusion the court said (R. 17):

> We are not so naive as to believe that relator's return to the Soviet Union in 1932 and his employment there for three years would be countenanced by the Soviet Government unless relator was a member of an organization or society considered subver-

> sive by the Attorney General. In other words, relator, by denying membership in the Communist Party during the three years he was last in the Soviet States, demonstrates to us that he is withholding to some extent at least, the truth in the foregoing respect.

The Court of Appeals for the Eighth Circuit reversed the District Court's judgment with directions to grant bail (R. 90–91). It found that no "conduct on behalf of [respondent] occurred subsequent to his original arrest and enlargement on bail which warranted the cancellation of his bail and his rearrest" (R. 87), and that there "is nothing to indicate that if enlarged on bail [respondent] would not at all times be available, nor is there any evidence that if so enlarged his enlargement would result in any menace to the public security" (R. 90). It then held "that the action of the Attorney General in rearresting [respondent] and refusing to enlarge him on bail is arbitrary and an abuse of discretion" (R. 90).

REASONS FOR GRANTING THE WRIT

The facts in the instant case are essentially like those in *Carlson* v. *Landon,* 187 F. 2d 991 (C. A. 9), petition for certiorari pending, No. 35, this Term, in which the court upheld the action of the Attorney General in denying bail to aliens against whom deportation proceedings were pending, and those in *Butterfield* v. *Zydok,* 187 F. 2d

802 (C. A. 6), petition for certiorari pending, No. 136, this Term, in which, on the contrary, the court held the Attorney General's action to be an abuse of discretion and ordered the alien released on reasonable bail. In those cases, as in the instant case, the aliens had lived in the United States for extended periods of time; there was no evidence that they had been convicted of any crime; they had reported for hearings as required; and they were rearrested and their bonds canceled after the Internal Security Act was passed. As here, the decision of the Attorney General to detain them without bail was supported by evidence that they had been active in the Communist movement. The court below relied on the *Zydok* case, saying that it was "a case very similar to the case at bar" (R. 87).

The question in the instant case, as in *Carlson* and *Zydok*, is whether the Attorney General is justified, within the discretion granted him by the statute, to withhold bail from an alien pending final determination of deportation proceedings against him, on the basis of the alien's active participation in Communist Party affairs. Because of the importance of that question and the conflict between the decision of the Ninth Circuit in *Carlson* and that of the Sixth Circuit in *Zydok*, the Government petitioned for a writ of certiorari in the *Zydok* case and is not opposing the petition for a writ in the *Carlson* case. The de-

cision below is an addition to that conflict which should be resolved by this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted and the cause considered together with the *Carlson* and *Zydok* cases, Nos. 35 and 136.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1951.

U. S. GOVERNMENT PRINTING OFFICE: 1951

In the Supreme Court of the United States

OCTOBER TERM, 1951

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No. ~~304~~

HARRY GORDON, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, PETITIONER

v.

KNUT EINAR HEIKKINEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF THE PETITIONER TO VACATE AND REMAND

The Solicitor General, on behalf of petitioner, moves this Court to vacate the judgment of the Court of Appeals for the Eighth Circuit and to remand the cause to the United States District Court for the District of Minnesota for further proceedings in accordance with the opinion of this Court in *Carlson, et al.* v. *Landon,* No. 35, and *Butterfield* v. *Zydok,* No. 136, decided March 10, 1952.

On March 24, 1952, the Court granted the Government's petition for certiorari. The legal questions presented by the petition are those which

were resolved in favor of the Government in *Carlson, et al.* v. *Landon,* and *Butterfield* v. *Zydok.* The facts supporting the Attorney General's denial of bail in this case are based upon the respondent's testimony (R. 37–64) and are clearly sufficient under the *Carlson* and *Butterfield* decisions. Accordingly, we believe that no useful purpose will be served by briefing and argument in this case. However, in this case, as in *Butterfield* v. *Zydok,* the alien was rearrested under an outstanding warrant, rather than under a new warrant as required by that decision. It would seem that this case should be disposed of in the same manner as *Zydok.*

It is therefore respectfully submitted that the judgment of the Court of Appeals for the Eighth Circuit should be vacated and the cause remanded to the District Court for further proceedings in accordance with the opinion of this Court in *Carlson, et al.* v. *Landon,* No. 35, and *Butterfield* v. *Zydok,* No. 136.

Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.

APRIL 1952.

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HARRY GORDON, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, PETITIONER,

v.

KNUT EINAR HEIKKINEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION TO VACATE AND REMAND

On March 10, 1952 the Court rendered a decision in the cases of *Carlson et al.* v. *Landon*, No. 35 and *Butterfield* v. *Zydok*, No. 136. Two weeks later, on March 24, 1952, the Court granted certiorari herein. Although certiorari was granted on its petition, the Government is now urging that certiorari be dispensed with and that instead it be granted what in effect is, summary judgment in its favor on the theory that the case at bar is similar to the *Zydok* case, and hence can be disposed of in the same manner.

I

The legal issues in this case are not, as the Government contends, resolved by the *Carlson* and *Zydok* cases. Mr. Justice REED stated the question to be in the latter cases whether the Attorney General "may after taking into custody active alien communists on warrants, charging either membership in a group that advocates the overthrow by force of this Government or inclusion in any

prohibited classes of aliens, continue them in custody without bail, at his discretion pending determination as to their deportability, under §23 of the Internal Security Act."

It is important to note that in upholding the Attorney General in both the *Carlson* and *Zydok* cases, the Court justified the "detention of all these parties without bail as a menace to the public security."

In the case at bar, the Court of Appeals reversed the District Court and found as a matter of law that the Attorney-General abused his discretion in rearresting appellants and refusing to enlarge him on bail because there is "no evidence that if so enlarged his enlargement would result in any menace to public security" (R. 90).

When this Court granted certiorari herein, as above stated, it had already decided the *Carlson* and *Zydok* cases two weeks previously. It was therefore well aware of the purport of its decision in those cases and hence the grant of certiorari herein must have been on the basis that this case involves issues other than those decided in the earlier cases. It seems fairly obvious that if this Court believed the issues herein had been decided by the determination in the *Carlson* and *Zydok* cases, the petition for certiorari would not have been granted. Clearly, the Court would have made such other disposition it deemed more appropriate in the case.

Wherefore it is respectfully submitted that the motion of the Solicitor General to vacate the judgment of the Court of Appeals for the Eighth Circuit and to remand the case to the United States District Court for the District of Minnesota for further proceedings in accordance with the opinion in *Butterfield* v. *Zydok* be denied in all respects.

Dated April, 1952.

BLANCH FREEDMAN,
Attorney for Respondent.

Adams Press, Inc., 82 Beekman Street, New York, N. Y., BEekman 3-1030-1031

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 7

HARRY GORDON, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, PETITIONER

v.

KNUT EINAR HEIKKINEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM SUGGESTING THAT THE CAUSE IS MOOT

This cause arose on respondent's petition for a writ of habeas corpus in which he challenged the validity of his detention by the Attorney General, under Section 20(a) of the Immigration Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, pending final determination of respondent's deportability.

That issue has now become moot. On October 8, 1951, the Assistant Commissioner ordered deportation of respondent according to law and on April 9,

1952, said order was affirmed by the Board of Immigration Appeals. Copy of said order of affirmance is annexed hereto.

Section 20(a) of the Immigration Act, as amended provides:

> * * * When such an order of deportation has been made against any alien, the Attorney General shall have a period of six months from the date of such order within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on conditional parole, or upon bond in an amount and specifying such conditions for surrender of the alien to the Immigration and Naturalization Service as may be determined by the Attorney General. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States has not been effected, within six months from the date of the order of deportation the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized hereinafter in this section. * * *[1]

Since six months have elapsed since the final order of deportation was issued, the Attorney General no longer has authority to hold respondent in custody pursuant to Section 20(a). Thus the issue in this cause no longer exists.

It is therefore respectfully suggested that, in ac-

[1] Section 20(b) provides for supervision by the Attorney General after the six months period, but not for detention.

cordance with the procedure suggested by this Court in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40, the judgment of the Court of Appeals be reversed and the cause remanded to the district court with direction to dismiss it as moot.

ROBERT L. STERN,
Acting Solicitor General.

OCTOBER 1952.

U. S. DEPARTMENT OF JUSTICE

Board of Immigration Appeals

April 9, 1952.

File: A-4316699.

In Re: KNUT EINAR HEIKKINEN.

IN DEPORTATION PROCEEDINGS.

IN BEHALF OF RESPONDENT: Isidore Englander, Esquire, 205 East 42nd Street, New York 17, New York. Heard on February 6, 1952.

CHARGES:

Warrant: Act of 1924—No immigration visa.

Act of October 16, 1918, as amended—at time of, and after, entry, alien member of organization that advocates and teaches overthrow, by force and violence, of Government of United States.

Act of October 16, 1918, as amended—At time of, and, after, entry, alien member of organization that distributes, etc., printed matter advocating overthrow, by force and violence of Government of United States.

Lodged: Act of October 16, 1918, as amended—After entry, alien member of Communist Party of United States.

Act of October 16, 1918, as amended—At time of entry, alien who was a member of Communist Party of United States.

APPLICATION: Termination of proceedings, or reopening.

DETENTION STATUS: Released under court bond of $2500, pending appeal from denial of petition for writ of habeas corpus by United States Dis-

trict Court, District of Minnesota; on June 20, 1951, U. S. Court of Appeals, 8th Circuit, reversed the order dismissing the writ of habeas corpus and remanded case to District Court.

On October 8, 1951 the Assistant Commissioner ordered deportation according to law of the respondent on the documentary charge stated in the warrant of arrest and on the first lodged charge. Having found the alien deportable on two charges, the Assistant Commissioner pretermitted consideration of the other charges filed and lodged against respondent. The alien appeals to this Board from that order.

The appellant is an alien who was born in Finland in 1890. In 1910 he emigrated to Canada where he continued to live until he entered the United States in 1916. While in Canada he acquired Canadian citizenship, but found at a later date that he had lost that citizenship. He was admitted to the United States for permanent residence in 1916.

Respondent gave much more extensive testimony before the United States District Court for the District of Minnesota at St. Paul, Minnesota on November 10, 1950 than he has given in the immigration hearings. The record of the United States District Court in that proceeding, which was to secure the release of respondent from custody after his arrest on a warrant issued by the Immigration and Naturalization Service, has been made an exhibit in these deportation proceedings. This testimony, Exhibit 11, was offered in evidence by the examining officer on page twenty-five of the record now before us and was accepted by the hearing officer. The alien first lodged an objection to the

acceptance of this exhibit into the record, but later withdrew that objection. It is our opinion that this exhibit was admissible.

The record shows that respondent has made a number of trips out of the United States since his entry in 1916, returning each time without benefit of the necessary documents. He spent one winter in Canada. He spent three years, approximately 1932 to 1935, in the U.S.S.R. He made several trips in and out of the United States employed as a seaman. He is deportable on the documentary charges.

Respondent was a member of the Communist Party from 1923 to 1930 and has attended Communist Party functions without membership subsequent to that date. He has testified repeatedly to his Communist Party membership. He denies that he has been a member of the Party since 1930. Under the Act of 1918, as amended by the Internal Security Act of 1950, respondent is deportable from the United States for his past membership in the Communist Party.

Counsel objects that respondent was denied due process in his last immigration hearings, because his counsel was not present at those hearings. Approximately a year and a half after respondent's return from Russia in 1935, he became associate editor, later editor-in-chief, of a Finnish language newspaper, "Eteepain," in New York City. He was associated with that newspaper for approximately fifteen years, until it suspended operations and merged with another Finnish language newspaper, "Tymies", now known as "Tymies-Eteepain," published in Superior, Wisconsin. Respondent became associate editor of the merged

newspaper. About August 15, 1950, for the purpose of working for this newspaper respondent removed himself from New York City to Superior, Wisconsin. During the earlier immigration hearings, Mr. Isidore Englander, who appeared in respondent's behalf before this Board, had represented respondent in New York City. After the passage of the Internal Security Act of 1950, respondent was rearrested in Superior, Wisconsin, and detained in jail at Duluth, Minnesota. At the time of his hearing before a three judge court in St. Paul, Minnesota, he was represented by another attorney. When he appeared for a hearing de novo on January 30, 1951, before an officer of the Immigration and Naturalization Service at Duluth, Minnesota, he was not represented by counsel. He stated that his attorney, Mr. Englander, was busy and could not come to Duluth to the hearing. Mr. Englander had filed a notice of appearance, but had already informed the Immigration and Naturalization Service in that district that he would be unable to appear on the date the hearing was scheduled. The hearing officer continued the hearing until March 1, 1951, in order to give the alien an opportunity to secure counsel. When the hearing was reconvened on March 1, 1951, the alien was still unrepresented. Mr. Englander had indicated in correspondence with the Service that it would be impossible for him to travel to Duluth, Minnesota in the foreseeable future, and requested that the hearing be transferred to New York City. In argument before this Board, counsel used his own failure to appear at that hearing as basis for one of his chief objections, that because there was no attorney present at the hearing the alien had been

denied due process and the right of counsel. He contends that the hearing should have been transferred to New York City in order that he could be present. It is obvious that respondent removed himself of his own will from New York City to Superior, Wisconsin. The latter city had become his residence, place of employment, and was the place where he was arrested. It is clear that the District wherein he was then living was the proper locale for the immigration hearings. Respondent has secured counsel other than Mr. Englander for the appearance before the United States District Court in St. Paul. He was given adequate opportunity to secure other counsel to represent him in his immigration hearings, after it became evident that Mr. Englander was not going to do so. This argument is clearly lacking in merit.

The other objections, procedural and constitutional, made by counsel in oral argument before this Board have been recently considered and rejected by the Supreme Court in the cases of *Harisiades* v. *Shaughnessy,* 342 U. S. 580, *Carlson and others* v. *Landon* and *Butterfield* v. *Zydok,* 342 U.S. 524. The appeal will be dismissed.

ORDER: It is ordered that the appeal be dismissed

(S). THOMAS G. FINUCANE,
Chairman.

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